Supreme Court, U.S.
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No. 03-737

In the Supreme Court of the United States

JAMES H. LIPSCOMB III, ET AL., PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Adjutant General of a state National Guard unit, and the National Guard unit itself, are subject to the requirements of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et sq.*, when they act in their capacity as employers of National Guard civilian technicians, who are designated by statute to be federal employees.

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v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-18a) is reported at 333 F.3d 611. The opinion of the district court (Pet. App. 22a-47a) is reported at 200 F. Supp. 2d 650.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2003. A petition for rehearing was denied on August 22, 2003 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on November 19, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7101 *et seq.*, governs federal-sector collective bargaining. The FSLMRS provides, *inter alia*, that "[e]ach employee shall have the right to form, join, or assist any labor organization." 5 U.S.C. 7102. The term "employee" is defined to include any individual who is "employed in an agency." 5 U.S.C. 7103(a)(2)(A). The term "agency" is in turn defined to mean "an Executive agency * * *, the Library of Congress, [and] the Government Printing Office." 5 U.S.C. 7103(a)(3). The FSLMRS is administered by respondent Federal Labor Relations Authority (FLRA or Authority). See 5 U.S.C. 7104-7105.

2. The National Guard Technicians Act of 1968 (Technicians Act), 32 U.S.C. 709, provides for the employment by local National Guard units of civilian "technicians" who perform a variety of administrative, clerical, and technical tasks. The Secretary of the Army or the Air Force is directed to "designate" the Adjutant General (AG) of the relevant state national guard "to employ and administer the technicians authorized by" the Technicians Act. 32 U.S.C. 709(d). Critically for this case, the statute further provides that "[a] technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States." 32 U.S.C. 709(e).

3. In April 2000, the Association of Civilian Technicians (ACT), a union representing civil technicians of various National Guard units around the country, filed a petition with the FLRA, seeking an election to determine whether the union should be the exclusive representative of civilian technicians employed by peti-

tioner Mississippi Army National Guard (MSANG). Pet. App. 4a, 26a. Pursuant to 5 C.F.R. 2422.17, petitioner Mississippi National Guard (MSNG) requested, and the FLRA regional office held, a hearing to determine the appropriateness of the proposed bargaining unit. Pet. App. 26a. In February 2001, the regional office issued an order granting the union's petition for an election and rejecting petitioner MSNG's opposition. *Id.* at 4a-5a, 26a. Petitioner MSNG sought review by the full FLRA, which upheld the regional office's decision in June 2001. *Id.* at 5a, 26a.

4. After the FLRA issued its ruling, petitioners filed the instant suit. Petitioners sought a declaratory judgment to the effect that (1) the MSANG is not a federal agency subject to the requirements of the FSLMRS, (2) the FLRA's order that an election be held violates the Tenth and Eleventh Amendments to the United States Constitution, and (3) the employees involved cannot be represented by a union because they are military personnel. Pet. App. 26a-27a. Petitioners also sought a preliminary injunction forbidding the Authority from conducting the election. *Id.* at 27a.

The district court dismissed petitioners' suit for failure to state a claim upon which relief can be granted. Pet. App. 19a-21a (final judgment), 22a-47a (opinion). The court held that it had subject matter jurisdiction to adjudicate petitioners' claims, and that those claims were ripe for review. *Id.* at 27a-34a. The court concluded, however, that petitioners' claims failed on the merits. *Id.* at 35a-47a. The court explained that "every court that has considered the issue has held that national guard technicians, as federal employees who are not excluded from coverage of the [FSLMRS], fall within the coverage of that Act and thus have the right to choose union representation." *Id.* at 38a. And, while

acknowledging that Mississippi's Adjutant General is a state officer, the court agreed with the Authority that, "in his capacity as the employer of these federal employees, the Adjutant General acts as a federal employer." *Id.* at 41a. The court explained that "it is impossible to recognize and give effect to the right of technicians as federal employees 'to form, join, or assist any labor organization' without recognizing that in his role as their employer, the MSNG and/or the Adjutant General is a federal employer." *Id.* at 45a (quoting 5 U.S.C. 7102). The court rejected petitioners' Tenth and Eleventh Amendment claims on the ground that the FLRA did not seek "to compel the MSNG or the Adjutant General, in its/[his] capacity as state agents or officers, to enforce the [FSLMRS], but rather, the Authority's purpose is to compel a federal agency to comply with obligations imposed by federal law." *Id.* at 45a n.15.

5. The court of appeals affirmed. Pet. App. 3a-18a. Relying on 32 U.S.C. 709(e), the court found it "indisputable that the technicians of the MSANG are 'employees of an Executive agency' under the coverage terms of the [FSLMRS]. They therefore have the right to choose union representation, as indeed numerous cases have acknowledged." Pet. App. 9a (brackets in original). Because the state Adjutant General is charged by the Technicians Act with the responsibility of directing and supervising the civilian technicians, who are designated by that Act as federal employees, the court of appeals concluded that the AG when acting in his capacity as the technicians' employer is an "Executive agency" for purposes of the FSLMRS. *Id.* at 12a-13a. Like the district court, the court of appeals also held that the AG's status as a federal agency, when acting as employer of the civilian technicians, foreclosed

petitioners' Tenth and Eleventh Amendment claims. *Id.* at 14a-15a n.7.

Based on its assessment of the AG's status, the court of appeals concluded that the MSANG and MSNG also are "executive agencies for the purpose of FLRA authority and this legal proceeding." Pet. App. 16a. That is so, the court explained, "because [the MSANG and MSNG] exist and operate under the authoritative direction and control of the adjutant general—indeed they are merely the adjuncts of his office, under whom, and on whose behalf, civilian technicians work." *Ibid.* The court of appeals concluded that petitioners had offered "no persuasive reason to reject decades of settled practice and the decisions of [the court's] sister circuits, which have upheld the organizational rights of national guard civilian technicians under the [FSLMRS]." *Id.* at 17a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition for a writ of certiorari should be denied.

1. "The National Guard occupies a unique position in the federal structure," *New Jersey Air Nat'l Guard* v. *FLRA*, 677 F.2d 276, 278 (3d Cir.), cert. denied, 459 U.S. 988 (1982), with its organization and functions reflecting a dual federal-state character. The National Guard is "an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war," and it "may be federalized * * * to assist in controlling civil disorders." *Ibid.* (quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 7 (1973)); see 32 U.S.C. 102. Its activity, makeup, and functions are primarily governed by federal law. 677 F.2d at 279. At the same

time, however, the National Guard—which is the modern-day organized militia, see U.S. Const. Art. I, § 8, Cl. 16; *Perpich* v. *DOD*, 496 U.S. 334, 341-346 (1990) —is "a state agency under state authority and control." *New Jersey Air Nat'l Guard*, 677 F.2d at 279.

In addition to purely military personnel, Guard units employ "dual-status" technicians to perform a wide range of administrative, clerical, and technical tasks. See *New Jersey Air Nat'l Guard*, 677 F.2d at 279. Since the enactment of the Technicians Act in 1968, each "dual-status" technician has been designated by statute as "an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States." 32 U.S.C. 709(e).[1] The courts of appeals that have considered the question have uniformly concluded that, in light of the technicians' express statutory designation as federal employees, those workers possess the protections—including the right to bargain collectively through union representatives—conferred by the FSLMRS. See, *e.g.*, *New Jersey Air Nat'l Guard*, 677 F.2d at 284; *California Nat'l Guard* v. *FLRA*, 697 F.2d 874, 879 (9th Cir. 1983); *Nebraska Military Dep't* v. *FLRA*, 705 F.2d 945, 952-953 (8th Cir. 1983); *Indiana Air Nat'l Guard* v. *FLRA*, 712 F.2d 1187, 1190 n.3 (7th Cir. 1983); *United*

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[1] In order to be a National Guard civilian technician, an individual must also hold a military position in the Guard, 32 U.S.C. 709(b), unless the position has been designated by the Secretary of Defense as a position "to be filled only by a non-dual status technician," 32 U.S.C. 709(c)(1). This case, however, involves the federal employment rights of the technicians only in their capacity as civilian employees.

States Dep't of Def. v. *FLRA*, 982 F.2d 577, 578 (D.C. Cir. 1993).[2]

When a state National Guard unit is not acting in a federalized military capacity, it is headed by an Adjutant General, who must be designated by the appropriate Secretary of the Army or of the Air Force "to employ and administer the technicians authorized" by the Technicians Act. 32 U.S.C. 709(d). Although an Adjutant General is for many purposes a state officer, he functions as a federal agency in his administration of the National Guard technicians program. See, *e.g.*, *Gilliam* v. *Miller*, 973 F.2d 760, 762 (9th Cir. 1992) ("We agree that the [Oregon Adjutant General's] personnel actions as supervisor over the federal civilian technicians are taken in the capacity of a federal agency."); *NeSmith* v. *Fulton*, 615 F.2d 196, 199 (5th Cir. 1980) ("[T]hat an adjutant general is a state officer does not preclude his simultaneously being a *federal agency*."); *Chaudoin* v. *Atkinson*, 494 F.2d 1323, 1329 (3d Cir. 1974) ("[T]here can be no doubt that the Adjutant General of Delaware is an agency or agent of the

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[2] As the court of appeals in the instant case explained (Pet. App. 7a), 32 U.S.C. 709(f) (formerly 32 U.S.C. 709(e) (1994)) reserves certain decisions concerning the employment of civilian technicians to the sole discretion of the Adjutant General. The courts of appeals have consistently held that "the matters explicitly reserved to the discretion of the adjutants general by section 709(f) reflect Congress's careful compromise, and thus are beyond the scope of bargaining under the [FSLMRS]." Pet. App. 7a; see *id.* at 7a-8a (citing cases). Thus, while the courts of appeals have recognized that National Guard civilian technicians are covered by the FSLMRS and are entitled to elect union representation, the *scope* of the technicians' collective bargaining rights is not necessarily coextensive with that of other covered federal employees.

United States" in administering the civilian technicians program.).

Petitioners contend (Pet. 11-19) that, except when the President exercises his authority to call National Guard units or members into federal service (see 10 U.S.C. 12405), National Guard units and personnel (including the Adjutant General) function purely as state entities. But whatever the merits of that contention as applied to other categories of National Guard personnel, it is clearly wrong with respect to the civilian technicians whose employment rights are at issue here. Under the plain terms of 32 U.S.C. 709(e), those technicians are at all times employees of the appropriate military department and of the United States, regardless of whether they or the unit(s) in which they serve have been called into federal service pursuant to 10 U.S.C. 12405. Indeed, perhaps the most striking feature of the certiorari petition is its failure to cite 32 U.S.C. 709(e), let alone to address the implications of that provision for the questions presented in this case.

2. Petitioners' claims under the Tenth and Eleventh Amendments lack merit and do not warrant this Court's review.

a. Petitioners contend that application to them of the FSLMRS would "conscript the Petitioners into administering and participating in a federal regulatory scheme." Pet. 23; see Pet. 22-23; *Printz* v. *United States*, 521 U.S. 898, 935 (1997) (holding that the federal government may not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program"). Petitioners do not, however, call into question the constitutionality of 32 U.S.C. 709(d), which directs the Secretary of the Army or Air Force to designate Adjutants General "to

employ and administer the technicians authorized by" the Technicians Act. In light of their unchallenged responsibility to "employ and administer" a group of federal employees, the requirement that petitioners perform that duty in compliance with applicable federal law creates no substantial Tenth Amendment question. Cf. *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988) (distinguishing between federal laws that "regulate[] state activities" and federal laws that "seek to control or influence the manner in which States regulate private parties"; holding that the Tenth Amendment's anti-commandeering principle applies only to the latter category of laws; and noting that States and municipalities may properly be required to conform their "employment practices" to governing federal law); *Reno* v. *Condon*, 528 U.S. 141, 150-151 (2000) (relying on *Baker* in rejecting state officials' Tenth Amendment challenge to the Driver's Privacy Protection Act of 1994). Because the technicians' proper status as federal employees is acknowledged, and because petitioners do not challenge Section 709(d)'s basic directive that the Adjutant General must "employ and administer" those technicians, the ancillary federal responsibilities imposed on the Adjutant General by the FSLMRS raise no constitutional difficulties.

b. Petitioners contend (Pet. 19-22) that the FLRA order at issue here unconstitutionally impairs Mississippi's sovereign immunity from private suits. But because the relevant FLRA proceedings involve petitioners' performance of their duties as federal agencies, petitioners cannot invoke the immunity of the State. See Pet. App. 15a n.7. In any event, "[i]n ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government." *Alden* v.

Maine, 527 U.S. 706, 755 (1999). Thus, even if petitioners were entitled to the State's sovereign immunity, that immunity would not extend to an administrative or judicial enforcement action prosecuted by the FLRA. Although petitioners observe (Pet. 4, 20) that the FLRA investigation was triggered by the ACT's request for an election, that fact alone is insufficient to trigger the State's immunity: federal officials often (and appropriately) consider the views of private parties in determining whether to exercise their constitutional authority to file suit against a State. And while petitioners rely (see Pet. 20-22) on *FMC* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), they make no effort to demonstrate that the proceedings within the FLRA bore a functional resemblance to a suit in federal court. Compare *id.* at 756-759. Finally, even if the FLRA proceedings were regarded as the constitutional equivalent of a private lawsuit against a state entity, the Adjutant General would have no immunity from an administrative order (such as the FLRA's directive in this case that a representation election be held) that is designed to ensure prospective compliance with federal law. See, *e.g.*, *Alden*, 527 U.S. at 757; *Ex parte Young*, 209 U.S. 123 (1908).

3. Petitioners contend (Pet. 24-26) that the Fifth Circuit's ruling conflicts with numerous court of appeals decisions addressing the status of Adjutants General or state National Guard units. No such conflict exists. To the contrary, the courts of appeals that have addressed the question have uniformly held that civilian technicians within the National Guard are entitled to the protections of the FSLMRS. See pp. 6-7, *supra*. The cases on which petitioners rely are readily distinguishable.

Clark v. *United States*, 322 F.3d 1358 (Fed. Cir. 2003) (see Pet. 24-25), involved a suit filed by a member of the Alabama National Guard seeking compensation for mandatory correspondence courses that he had taken as a member of that unit. 322 F.3d at 1361. The government argued (see *id.* at 1364) that the suit was barred by 37 U.S.C. 206(d), which provides that Section 206 "does not authorize compensation for work or study performed by a member of a reserve component in connection with correspondence courses of an armed force." The court of appeals held that the statutory bar was inapplicable because the plaintiff had not been called into federal service and had taken the relevant courses as a member of the Alabama National Guard, rather than as a member of the National Guard of the United States. See 322 F.3d at 1364-1368.

Gilbert v. *United States*, 165 F.3d 470 (6th Cir. 1999), and *United States* v. *Hutchings*, 127 F.3d 1255 (10th Cir. 1997) (see Pet. 25-26), likewise presented no question concerning the status of National Guard civilian technicians. In both cases, the Guard carried out certain law enforcement duties, which were alleged to violate the Posse Comitatus Act, 18 U.S.C. 1385. The courts of appeals held that the Act bars use of the Guard's military capacity for law enforcement only when the Guard has been called into federal service. See *Gilbert*, 165 F.3d at 472-473; *Hutchings*, 127 F.3d at 1257-1258.

Clark, *Gilbert*, and *Hutchings* recognize that the status, rights, and responsibilities of individual National Guard members may vary depending on whether the relevant Guard unit has been called into federal service. None of those cases, however, involved the civilian technicians provided for in 32 U.S.C. 709, who are specifically designated as federal employees without

regard to the status, at any given time, of the larger unit in which they serve. Those decisions therefore do not conflict with the Fifth Circuit's ruling here, which holds only that petitioners act as federal agencies in performing their duty to employ and administer the civilian technicians.[3]

The cases cited in the first full paragraph on page 25 of the petition are likewise inapposite. Those cases reflect the National Guard's dual character and simply hold that a state unit of the National Guard partakes of the State's sovereign immunity from private suits when it acts in its capacity as a state entity. Those decisions do not address the authority of the FLRA to pursue an enforcement action intended to ensure that a National Guard unit and its Adjutant General comply with federal law in carrying out their duty to employ and administer federal employees.

Petitioners' reliance (Pet. 25) on *Singleton* v. *MSPB*, 244 F.3d 1331 (Fed. Cir. 2001), is also misplaced. As petitioners point out (Pet. 25), the court of appeals in *Singleton* held that the Merit Systems Protection Board (MSPB) lacked statutory authority to issue a

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[3] For similar reasons, there is no merit to petitioners' contention (Pet. 18-19) that the court of appeals' decision casts doubt on the legality, under the Posse Comitatus Act, of using National Guard personnel for domestic law enforcement purposes. The court of appeals held only that petitioners act as federal agencies in their supervision of the civilian technicians described in 32 U.S.C. 709; the court did not suggest that any National Guard unit within the State of Mississippi had been (or should be treated for purposes of the Posse Comitatus Act as having been) federalized in its entirety. Nor did the court suggest that the technicians themselves, when performing their civilian duties, should be regarded as "part of the Army or the Air Force" within the meaning of the Posse Comitatus Act.

binding order to the Adjutant General of a state National Guard, even though the case involved the Adjutant General's employment of a civilian technician. See 244 F.3d at 1333, 1336-1337. That case, however, did not present any question concerning the powers of the FLRA or the construction of the FSLMRS, and the Federal Circuit did not discuss the various court of appeals decisions (see pp. 6-7, *supra*) that have recognized civilian technicians' right under the FSLMRS to engage in collective bargaining. Indeed, the court in *Singleton* relied in part on the MSPB's own "determin[ation] that its orders are not enforceable against state national guards," *id.* at 1337—a determination that has no analogue in the instant case. Any tension between the decision in *Singleton* and the Fifth Circuit's ruling in the instant case therefore provides no basis for this Court's review.[4]

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[4] Section 518(a) of Title 28 of the United States Code provides that, "[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested." 28 U.S.C. 518(a); see 28 C.F.R. 0.20(a); *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 93 (1994). Any certiorari petition filed by petitioners in their capacities as federal employers of the civilian technicians would therefore require the authorization of the Solicitor General, which has not been given in this case. Cf. *Arkansas Nat'l Guard* v. *FLRA*, No. 99-1563 (8th Cir. Aug. 30, 1999) (App. A, *infra*, 1a) (dismissing the Arkansas National Guard's petition for review of an FLRA order "because the appeal is not authorized by the Department of Justice and is not authorized or approved by the Solicitor General"); *FLRA* v. *Puerto Rico Nat'l Guard*, No. 99-1293 (1st Cir. Nov. 23, 1999) (App. B, *infra*, 3a) (holding that the United States Department of Justice "has the sole litigating authority for the [Puerto Rico National] Guard in this particular matter" because "the matter arises under the [FSLMRS], 5 U.S.C. §§ 7101

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
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FEBRUARY 2004

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et seq., and concerns the Guard's capacity in administering a federal civilian technician's program").

In the instant case, however, petitioners do not seek review, as federal agencies, of any question concerning the substantive rights and obligations defined by the FSLMRS. Rather, petitioners' sole argument is that they are not properly regarded as federal agencies to begin with. Under those circumstances, the United States does not believe that the Solicitor General's authorization is required and therefore does not object to the filing. By contrast, in both *Puerto Rico National Guard* and *Arkansas National Guard*, the legal claims that the relevant commonwealth and state officials sought to raise went beyond the contention that they were not properly regarded as FSLMRS agencies.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1563

ARKANSAS NATIONAL GUARD, BY THE ADJUTANT GENERAL OF THE STATE OF ARKANSAS, MAJOR GENERAL DON C. MORROW, PETITIONER

v.

THE FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

Aug. 30, 1999

Petition for Review of an Order of Federal Labor Relations Authority

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JUDGMENT

After consideration of the court this appeal is dismissed for lack of jurisdiction because the appeal is not authorized by the Department of Justice and is not authorized or approved by the Solicitor General. (5361-010199)

August 30, 1999

A true copy.

ATTEST: MICHAEL E. GANS
MICHAEL E. GANS
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-1293

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

PUERTO RICO NATIONAL GUARD, PUERTO RICO AIR NATIONAL GUARD, SAN JUAN, PUERTO RICO, RESPONDENT

Entered: Nov. 23, 1999

ORDER OF COURT

Before: SELYA, *Circuit Judge*, CYR, *Senior Circuit Judge* and LIPEZ *Circuit Judge*.

The Federal Labor Relations Authority ("Authority") has filed an application for summary enforcement of its May 15, 1998 order against the Puerto Rico National Guard and the Puerto Rico Air National Guard (collectively, "the Guard"). In the event that we deny the application and order full briefing, the Authority requests that we direct the Guard to file the opening brief. *Cf.* Fed. R. App. P. 15.1 (providing that in enforcement cases filed by the National Labor Relations Board, the party adverse to the Board proceeds first on briefing).

Unfortunately, the matter has been complicated by the fact that two different sets of attorneys—the Commonwealth of Puerto Rico Department of Justice ("PR-DOJ") and the United States Department of Justice ("US-DOJ")—have entered appearances in this court purporting to represent the Guard. In addition, the two different sets of attorneys have filed separate Answers that differ in fundamental ways. Not surprisingly, the Authority requests that the issue of representation be resolved.

We are persuaded that the US-DOJ has the sole litigating authority for the Guard in this particular matter because the Guard is being sued in its capacity as a federal agency. *See* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party or is interested . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."). In particular, the matter arises under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101 et seq., and concerns the Guard's capacity in administering a federal civilian technician's program. *Cf. Gilliam* v. *Miller*, 973 F.2d 760, 762 (9th Cir. 1992) ("We agree that the [Oregon Adjutant General's] personnel actions as supervisor over the federal civilian technicians are taken in the capacity of a federal agency."). Accordingly, we hereby strike the Answer filed by the PR-DOJ.

However, we are also persuaded that the issues are sufficiently complicated that summary enforcement is inappropriate, and that the case should proceed to full briefing. The parties shall fully address the issues raised in the US-DOJ Answer including (1) the Guard's suggestion that our review is not foreclosed by the fact

that it failed to file exceptions to the ALJ's decision; and (2) the Guard's contention that this court should exercise its equitable discretion not to enforce the order.

The Guard shall proceed first on briefing, and its brief shall be filed by December 23, 1999. The Authority's brief shall be filed within thirty days after the Guard's brief is filed. Any reply brief must be filed with fourteen days after service of the Authority's brief.

So ordered.

By the Court:

/s/ PHOEBE MORSE
PHOEBE MORSE, Clerk